STATE OF NEW YORK COUNTY OF MONROE
CITY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-vs-

RAMONA SANTORELLI, NIKKI KRAFT,
KATHLEEN RILEY, DEBORAH SEYMOUR,
ELISE JO TOOLEY and LYNN ZICARI,

Defendants.

MEMORANDUM OF LAW TO DISMISS THE INFORMATIONS

EDWARD J. NOWAK
Monroe County Public Defender
Attorney for Defendant
BY: LAWRENCE L. KASPEREK
Assistant Public Defender
10 N. Fitzhugh Street
Rochester, New York 14614

BY: DANIEL DELAUS
Legal Intern
10 N. Fitzhugh Street
Rochester, New York 14614
(716) 428-5210

BY: DAVID R. MOSS
Attorney for NIKKI KRAFT,
KATHLEEN RILEY, DEBORAH
SEYMOUR, ELISE JO TOOLY
and LYNN ZICARI
426 Powers Building
Rochester, New York 14614
(716) 454-5419

Revised Brief

PRELIMINARY STATEMENT

This is a Memorandum of Law in support of the defendants' motion to dismiss the informations charging them with violating New York State Penal Law Section 245.01, exposure of a person. The Memorandum provides support for each of the Federal and New York State constitutional challenges to the statute.

This Memorandum is written on behalf of all seven (7) defendants by Lawrence L. Kasperek and Daniel DeLaus of the Monroe County Public Defender's Office, and David R. Moss, Esq. Each of the defendants joins in the Memorandum submitted by Mary Lou Schloss, which is intended to be incorporated herein.

STATEMENT OF FACTS

The defendants were originally charged on June 21, 1986 at approximately 2:40 p.m. at Cobbs Hill Park, 530 Highland Avenue, in the City of Rochester with violating New York State Penal Law Section 245.01, exposure of a person. That section states that:

> A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the aerola. This section shall not apply to the breast-feeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

The defendants were arraigned on June 23, 1986 before the Honorable Herman J. Walz and pleaded innocent. Pretrial motions for dismissal were filed by Lawrence L. Kasperek on behalf of Ramona Santorelli, and David R. Moss, acting as independent counsel for Nikki G. Kraft, Kathleen F. Riley, Deborah A. Seymour, Elise Jo Tooley and Lynn E. Zicari. Mary Lou Schloss, appearing pro se, joined orally in all motions.

I: **SECTION 245.01 PROHIBITING WOMEN FROM APPEARING TOPLESS IN PUBLIC BUT NOT MEN, VIOLATES EQUAL PROTECTION UNDER THE NEW YORK STATE AND FEDERAL CONSTITUTIONAL GUARANTEES.**

The defendants in this case are charged with violating Section 245.01 of the New York State Penal Law.

> A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the aerola. This section shall not apply to the breast-feeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

It is the contention of the defendants that the Penal statute which they are accused of violating is unconstitutional and otherwise invalid, in that it violates the equal protection clause of the Federal Constitution (U.S. Const., 14th Amend.) and the New York State Constitution (N.Y. Const., Article I, §11). Specifically, the defendants contend that the statute violates equal protection because it burdens only women, and not men from exposing their breasts in public.

The Court of Appeals has repeatedly recognized and adopted the holdings of the United State Supreme Court that: "a statute which treats males and females differently violates equal protection unless the classification is substantially related to the achievement of an important governmental objective". People v. Liberta, 64 N.Y.2d 152 (1984); citing Caban v. Mohammed, 441 U.S. 380 (1979); Craig v. Boren, 429 U.S. 190 (1976); People v. Whidden, 51 N.Y.2d 457, app. dism. 454 U.S. 803 (1980) (emphasis added). This test applies for every gender-based classification whether the statute discriminates against males or against females. People v. Liberta, at 168. The People bear the burden of showing both the existence of an important governmental objective and the substantial relationship between the discrimination in the gender-

based classification of the statute and that objective. People v. Liberta, supra at 168; Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).

In response to this constitutional challenge the People's reliance on People v. Gilmore, 120 Misc.2d 741 (1973) is misplaced. That case is an anomaly and quite clearly misapplies and predates the constitutional standards established by the United States Supreme Court and adopted by this State's Court of Appeals.

In the seminal case of People v. Liberta, supra, the Court of Appeals was confronted with an equal protection challenge to New York State's rape statute (P.L. §130.35) which burdened only males who forcibly rape females but not females who forcibly rape males. Ibid. at 67. Utilizing the established constitutional test, that Court reasoned, in order to meet the burden of showing the gender-based law was substantially related to an important governmental objective, the People were required to set forth an "exceedingly persuasive justification" for the discriminatory classification. Ibid. at 170; citing Mississippi Univ. of Women v. Hogan, 458 U.S. 718, 724 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981). In order to meet this burden, the justification advanced by the People for Section 245.01 is that the statute merely reflects the current standards of the community in defining private or intimate parts of a female person. The People also claim that classification is justified because such discrimination prevents "the possibility of indecent conduct and avoid (sic) public disturbance and inconvenience". The task before this Court is to determine whether the justification advanced by the People can survive the test established by the United States Supreme Court and the courts of this State. The defendants contend this burden is not met in the present case, and therefore the gender-based discriminatory classification renders this statute unconstitutional.

The People's alleged justification for Section 245.01 does nothing more than perpetuate the "romantic paternalism" and chauvinistic characterization of women as sexual objects in our society. The contention that the primary purpose of this statute

is to prevent "the possibility of indecent conduct and avoid public disturbance and inconvenience" is absurd absent sufficient reliable evidence to justify such bold faced allegations. Can the sight of a bare-breasted female in a public place insight such torment that the imposition of criminal sanctions is necessary to prevent such conduct? Such "romantic paternalism" is typical of the traditional rationalization used to justify discrimination, which in pratical effect, puts women, not on a pedestal, but in a cage. Frontiero v. Richardson, 411 U.S. 677 (1973). Our Nation has had a long and unfortunate history of sexual discrimination. The sole basis of the classification established in the challenged statute is the sex of the individual, which burdens females but not males for appearing bare-breasted in public. Justice Brennan in Frontiero v. Richardson noted that this paternalistic attitude was and still is firmly rooted in our national consciousness.

> As a result of notions such as these, our text statute books became latent with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the nineteenth century the position of women in our society was, in many respects, comparable to that of Blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries or bring suit in their own names and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although Blacks were guaranteed the right to vote in 1870, women were denied even that right - which is itself "preservative of other basic civil and political rights" - until adoption of the Nineteenth Amendment half a century later.
>
> It is true, of course, that the position of women in America has improved marketly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visability of the sexual characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and perhaps most conspicuously in the political arena. Frontiero v. Richardson, 411 U.S. 607 (1973).

The second issue presented by the People in response to the equal protection challenge is that the statute reflects, assuming arguendo at least for the present, the will of the community (as expressed in legislative enactment) to define and proscribe the exposure of "private" or "intimate" parts of the female body. This issue is identical to that presented in People v. Onofre, 51 N.Y.2d 476 (1980). In a challenge to a New York State statute which prohibited consensual sodomy that Court reasoned: "[T]he community and its members are entirely free to employ theological teaching, moral suasion, parental advise, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy". The narrow question before us is whether the Federal State Constitutions permit the use of the criminal law for that purpose. That Court concluded it is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or apparatus for the intended enforcement of moral or theological views. The simple assertion by the People that Section 245.01 "merely reflects the current standards of the community" is an insufficient justification to meet the equal protection analysis required in this case. This assertion is an extremely dangerous idea that absolutely perverts the principles of individual liberty on which our Nation was founded. The very purpose of the Bill of Rights was to protect the individual and by so doing, society from such a danger. Our Nation was founded on the then revolutionary idea of individual rights and liberty ... that if no individual could be denied liberty then the liberty of all was protected. To be healthy, society must be free to change. Laws which fix "norms" inhibit change.

Finally, the People's assertion that Section 245.01 prevents the possibility of indecent conduct and avoids public disturbance or inconvenience necessarily implies that the conduct proscribed be offensive. The statute however is devoid of any requirement that the conduct proscribed by the statute be in any way offensive or annoying to other citizens, and therefore the challenged statute cannot be characterized

as a harassment statute justifying the criminal sanctions. People v. Uplinger, 58 N.Y.2d 936 (1983).

The Court of Appeals in People v. Liberta, recognized that in order for the People to meet their burden of proof in the substantial relationship test they are required, among other things, to show that the gender-based law serves the governmental objective better than a gender-neutral law would. In that case the Court held "a gender-neutral law sanctioning forcible rape would indisputably better serve, even if only marginally, the objective of deterring and punishing forcible sexual assault". Quoting the Supreme Court the case reasoned, "[a] gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny". Orr v. Orr, 440 U.S. at 282-283, supra. Ibid. at 170.

In the case at bar, the gender-based differential contained in Section 245.01 constitutes the same denial of equal protection for females, as that established in People v. Liberta, and Craig v. Boren addressing only males.

> [A]n "archaic or overbroad" generalization ... which is evidently grounded in long-standing stereo-typical notions of the difference between the sexes simply cannot serve as a legitimate rationale for a penal provision that is addressed (to only one sex) (Ibid., quoting Craig v. Boren, 428 U.S., at 198, supra; Cf. Orr v. Orr, 44 U.S. at p. 283, supra; Tribe, Constitutional Law, p. 1066). People v. Liberta, supra 169.

The government offers no concrete evidence tending to support its alleged justification for such differential treatment in Section 245.01. Indeed, their response merely serves to perpetuate the imposition of special disabilities (here penal sanctions) upon particular members of our society because of some accident of birth. Since Section 245.01 of the New York State Penal Law includes a gender-based classification both as written and as applied, it is subject to the constitutional scrutiny of an equal protection analysis pursuant to the holding of the Court of Appeals in People v.

Liberta, supra and the ruling of the United State Supreme Court in Craig v. Boren, 429 U.S. 190 (1976) and its progeny. Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Orr v. Orr, supra, 440 U.S. 268 (1979); Caban v. Mohammed, supra, 441 U.S. 380 (1979); Wengler v. Druggists Mutual Insurance Company, 446 U.S. 142 (1980); Kirchberg v. Feenstra, supra, 450 U.S. 455 (1981); Mississippi University for Women v. Hogan, supra, 458 U.S. 718 (1982). People have failed to meet their burden of setting forth an "exceedingly persuasive justification", that the discriminatory classification in Section 245.01, is substantially related to an important governmental objective. Accordingly, this Court should find that Section 245.01 of the New York State Penal Law violates equal protection because it exempts males from criminal liability for appearing bare-breasted in a public place while proscribing such conduct for females.

Having found that Penal Law Section 245.01 is an unconstitutional violation of equal protection, the remaining issue is the appropriate remedy for these equal protection violations. When a statute is constitutionally defective for violating equal protection, a court may either strike the statute, and thus make it applicable to no one or, extend the coverage of the statute to those formally excluded. People v. Liberta, 64 N.Y.2d at 170. This Court's task is to discern what course the Legislature would have chosen to follow if it had foreseen the court's ruling. Extending the coverage of this statute to those males who were formally excluded from criminal liability is both impractical and inappropriate. The only feasible and recommended remedy is that the statute should not be applied to any person male or female who appears bare-breasted in public in a non-commercial and certainly not lude manner.

II: **PENAL LAW SECTION 245.01 IS IMPERMISSIBLY VAGUE IN VIOLATION OF BOTH THE NEW YORK STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION.**

The defendants contend that New York State Penal Law Section 245.01 is invalid and unenforcable, as it is unconstitutionally vague and overbroad in violation of the defendants' guaranteed right of due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §6 of the New York State Constitution.

The New York State Court of Appeals has long recognized and adopted the holding of the United States Supreme Court "that constitutional due process requires that a statute which defines a substantive crime must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden". Sussman v. New York State Orgainized Crime Task Force, 39 N.Y.2d 227, 234 (1976); citing Papachriston v. City of Jacksonville, 405 U.S. 156 (1972); People v. Breck, 32 N.Y.2d 567 (1973). This notion of fair notice in due process requires that sanctions may only be imposed on any individual if "a reasonable man subject to the statute would be informed of the nature of the offense prohibited and what is required of him. Such warnings must be unequivocal." People v. Harris, 129 Misc.2d 577 (1985); People v. Byron, 17 N.Y.2d 64 (1966); Rose v. Locke, 423 U.S. 48 (1975). The test is otherwise when First Amendment rights are involved which is not true in this portion of defendants' challenge. (See, U.S. v. Mazurie, 419 U.S. 544 (1975). Despite the strong presumption of constitutionality for a duly enacted statute, "[a] statute which fails to distinguish between innocent conduct and action which is calculated to cause harm may not be sustained". People v. Pagnotta, 25 N.Y.2d 333, 337 (1969). This unequivocal certainty as to what acts or conduct are proscribed is strictly required where, as in the case at bar, the conduct covered by the statute is malum in se but merely malum prohibitum. People v. Shiffrin, 301 N.Y. 445 (1950); People v. Anamkiewicz, 298 N.Y. 176 (1948). Penal Law Section 245.01 does not contain any requirement of scienter

or mens rea but rather imposes strict liability on any person who appears in a public place in such a manner that private or intimate parts of his body are unclothed or exposed.

Once again the People's reliance on case law applying Section 245.01 is misplaced. In People v. Harris, 129 Misc.2d 577 (1985), cited in the People's response, the defendant was accused of deliberately exposing his naked penis to a male police officer and a female witness on a subway train. That court dismissed the constitutional challenge to the statute, holding that the defendant's deliberate exposure of his naked penis to a male officer and female passenger ... is indeed the bulls-eye of [the] statutes intent. Ibid. at 579.

Clearly, it was the defendant's provocative or lewd act which that court found persuasive, despite the absence of any mens rea requirement in the statute itself. This analysisis inapposite to the facts of our present case and the law of this State. "Statutes punishing indecent exposure, though broadly drawn must be carefully construed to attack the particular evil at which they are directed." People v. Price, 333 N.Y.2d 831 (1973).

Penal Law Section 245.01 however makes no such differentiation between sanction and innocent conduct, thus making this Section fatally defective in the due process analysis. The statute as written and applied is devoid of the element of traditional indecent exposure laws that the exposure be in a lewd or indecent manner. Black's Law Dictionary, 691 (5th Ed. 1979). See also, People v. Hildabridle, 353 Mich. 562, 92 N.W.2d 6, 19 (1958). The New York courts have consistently refused to presume that public nudity per se or nudity in the public recreational setting involves lewdness or criminal indecency. People v. Burke, 243 A.D. 83, aff'd 267 N.Y. 571 (1935); People v. Hardy, 77 Misc.2d 1092 (App. Term 2nd Dept. 1974). Therefore within the State of New York, Penal Law Section 245.01 cannot be characterized as a traditional

indecent exposure statute, and the ruling in Harris is again an anomoly. Recall the statute provides:

> A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the aerola. This section shall not apply to the breast-feeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

Prior to its most recent amendment the Court of Appeals in People v. Price pointed explicitly to the statute's purpose.

> Section 245.01 of the Penal Law was aimed at discouraging "topless waitresses and their promoters" (see, Practice Commentary by Denzer and McQuillan, McKinney's, Cons Law of New York, Book 39, Penal, Section 245.01 p. 200). It should not be applied to the noncommercial, perhaps accidental and certainly not lewd exposure alleged. Ibid. at 833.

The statute as amended, is unclear and invalid for vagueness in its description of "unclothed or exposed", a "public place", and "entertaining or performing in a play, exhibition, show or entertainment", all terms undefined within the meaning of the prohibition and open to arbitrary enforcement of the police.

Examples of such impermissible ambiguity readily come to mind. Would a sunbather lying on her front be in violation of the statute, for although her breasts may be unclothed, are they exposed? If while sunning she is laying on her back and she rests a magazine over her breasts is she exposed, despite the fact she may be unclothed? Does a "public place" include public bathrooms, including the use of urinals or toilet stalls without doors? Do schools, colleges, universities and gymnasiums or parks fall within the statutory meaning of the term "public place", such that the statute prohibits nudity in shower rooms? Is the age of the alleged perpetrator a consideration? Can an infant while being diapered be charged within the statute? Is a pre-adolescent female "topless" at a pool or beach in violation of the statute? Must

the entertainment mentioned in the statute be commercial or non-commercial? Must the entertainment be authorized or an organized production or is self-entertainment sufficient to avoid a criminal sanction? Do educational, medical, scientific and artistic endeavors fall within the definition of entertainment?

The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand that which is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement. Kolander v. Lawson, 461 U.S. 352 (1983). The most important aspect of the doctrine is "the requirement that a Legislature establish minimal guidelines to give law enforcement ... where the Legislature fails ... a criminal statute which may notpermit a 'standardless' sweep (that) allows policeman, prosecutors and juries to persue their personal predilections". Smith v. Gogrien, 415 U.S. 566, 575 (1972). Although the statute does not contain a standard for proscribing the exposure of private or intimate body parts of an person, its operation in effect is identical to that of enactmentss prohibiting so-called "indecent exposure" or "indecent conduct". People v. Harris, supra, 129 Misc.2d 577 (1985). Thus the interest of the State in enacting and enforcing Section 245.01 appears to be protection of the public from lewdness or indecency. No such intent can be found when the conduct in question involves otherwise unobjectionable activities being carried on in the nude. In People v. Gilbert, 72 Misc.2d 75 (New York Crim. Ct. 1972), the court considered the activities of a woman who, while nude on a public beach, played with a ball, swam, waived at a passing boat, and slowly applied suntan lotion to the front of her body. After first observing that "mere nudity in a public place does not constitute lewdness", the court went on to conclude that the woman's actions could not be called lewd. "Had the defendant been wearing a bathing suit, these acts would be considered completely wholesome, normal and usual for bathers at a public beach." Ibid. Similarly, in the present case, the defendants' actions - appearing topless in a public park - would have been wholesome,

normal, and usual had they been men. See also, People v. Hardy, 77 Misc.2d 1092 (N.Y. App. Term 1974) (being nude on a public beach is not enough to warrant conviction for public lewdness).

In People v. Smith, 44 N.Y.2d 613, 617 (1979), the Court explained that the distinctive difference between those enactments struck down due to vagueness and those upheld is that the valid enactment delineates specific conduct which the arresting officer must observe. Section 245.01 of the New York State Penal Law fails this test. The section is nothing more than a clumsy attempt to prohibit nudity in a public place. One of the reasons the Appellate Division and New York State Supreme Court, Fourth Department in TJPC Restaurant Corp. v. State Liquor Authority, 41 A.D.2d 441 (4th Dept. 1978), struck down an ordinance of the City of Rochester which made "nudity in a public place" illegal was that the term "nudity in a public place" when used without limiting language was "patently overbroad". Absent such limiting language, Section 245.01 as presently drafted and construed, contains no standard for determining what a person has to do or not do in order to avoid the criminal sanction. As such the statute is unconstitutionally vague in violation of due process on its face in that it allows possible applications to other factual contexts for which there is no reasonable basis for governmental intervention,and invests virtually complete discretion in the hands of law enforcement to determine whether an activity is violative of the statute.

III: SECTION 245.01 VIOLATES PROTECTED FUNDAMENTAL LIBERTY RIGHTS GUARANTEED UNDER THE NINTH AMENDMENT OF THE UNITED STATE CONSTITUTION.

The defendants contend that Section 245.01 is invalid and unconstitutional because, in part, it violates certain fundamental rights and liberties guaranteed by the Ninth Amendment of the United States Constitution. That amendment provides:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People.

Breathing vitality into the Ninth Amendment, Justice Goldberg in a concurring opinion in Griswold v. Connecticut, 381 U.S. 479 (1965) noted:

> While this Court has had little occasion to interpret the Ninth Amendment "[i]t cannot be presumed that any clause in the Constitution is intended to be without effect" ... in interpreting the Constitution "real effect should be given to all the words it uses" ... the Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold.

Justice Goldberg thereby concluded that although such a basic and fundamentally deep seeded right to privacy in marriage was not explicitly mentioned in the Constitution, any judicial construction that such a right was not protected by the Constitution would violate the Ninth Amendment which specifically states that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People". (emphasis added in original). Ibid. at 490-492.

It is now established beyond a doubt that constitutional protection is not limited specifically to enumerated rights; it encompasses other non-enumerated "penumbral" rights. Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Kent v. Dulles, 357 U.S. 116 (1958); Meyer v. Nebraska, 262 U.S. 390 (1923).

Personal liberty of expression - the liberty to determine one's own appearance and lifestyle - is one of these. Dwaye v. Barry, 483 F.2d 1126 (2nd Cir. 1973); Stall

v. School Board of Western Beaver Junior-Senior High School, 459 F.2d 339 (3rd Cir. 1972); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Cruz v. Clones, 432 F.2d 1259 (7th Cir. 1979); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969); Brackston v. Board of Public Instruction of Devaul County, Florida, 303 F.2d 958 (D.Fla. 1969).

"Personal liberty is not composed simply and only of freedoms held to be fundamental but includes the freedom to make any act on a less significant personal decisions without arbitrary governmental interference." Dwayne v. Barry, supra at 1130. As the Court stated in Richards v. Thurston, supra at 1284-85, "liberty seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the State free to interfere with those personal aspect of our lives which have no direct bearing on the abilities of others to enjoy their liberty". It matters little in what category this right is classified, "whether this right [of personal freedom] is designated as within the 'penumbra' of the First Amendment freedom of speech ... or as encompassed within the Ninth Amendment ... [or as other courts have held, as part of the due process or equal protection guarantees] it clearly exists." Breen v. Kahl, supra at 1036.

Although the word "liberty" is not defined in the Constitution, the United States Supreme Court has held in Griswold v. Connecticut, supra, that it includes at least the fundamental rights retained by the People under the Ninth Amendment. Writing of such fundamental rights Justice Douglas concluded: One's hairstyle, like one's taste for food, or one's liking of certain kinds of music, art, reading, recreation is certainly fundamental in our constitutional scheme - a scheme designed to keep government off the backs of people. Olff v. Eastside United High School District, 404 U.S. 1042 (1972) (Justice Douglas, dissenting).

Penal Law Section 245.01 affixes a criminal sanction to all females appearing in a public place topless. Quite clearly and without exception infringing on the

Certaintly, the mere innocent, indeed passive, non-threatening exercise of women appearing topless in public, as do men, offers little justification for the attachment of criminal sanctions. This expression of liberty offends nothing more than the artificial norms of proper attire and role of women in our society. Where, as here, sensitive and important personal rights are affected, the regulation may not be upheld merely on the assertion or basic showing that it is "reasonable" or "rationally related" to a legitimate end; rather, when constitutional guarantees involved are fundamental rights or liberties, regulations limiting these rights may be justified only after the strictest scrutiny and by a "compelling state interest". Roe v. Wade, 410 U.S. 173, 175 (1973). The People's response that the ultimate authority to govern such "expressions" rests with the Legislature misses the point. Since the People's arguments fail to even establish a rational relationship between the statutory restriction and the public health safety and welfare, as a legitimate State interest, that restriction must necessarily fail under the compelling state interest test as well. Bainbridge v. Williams, 397 U.S. 471 (1971).

IV: SECTION 245.01 OF THE PENAL LAW VIOLATES DEFENDANT'S RIGHTS TO FREEDOM OF SPEECH AND EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Defendants Were Engaged In Expressive Conduct Within The Scope Of the First Amendment's Protections.

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech". This provision has been incorporated by the due process clause of the Fourteenth Amendment, and restricts the actions of state as well as federal officials. See, e.g., Gitlow v. New York, 268 U.S. 652, 666 (1925). The First Amendment protects the free expression of opinions, beliefs and ideas. It was designed to facilitate "the widest possible dissemination of information from diverse and antagonistic sources", Associated Press v. United States, 326 U.S. 1, 20 (1945), and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the People". Roth v. United States, 354 U.S. 476, 484 (1957). See also Buckley v. Valeo, 424 U.S. 1, 49 (1976); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Whitney v. Californnia, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring).

The protection afforded by the First Amendment is not limited to written or verbal communication. In a long line of decisions, the Supreme Court has repeatedly held that the First Amendment applies to the expression of ideas through action, appearance and conduct, as well as to written and verbal forms of expression. For example, in Tinker v. Des Moines School District, 393 U.S. 503 (1969), the Court held that the First Amendment protects the right of students to wear black armbands as a protest against United States involvement in the Vietnam War. In Stromberg v. California, 283 U.S. 359 (1931), the Court upheld the right of individuals to publically display red flags as a gesture of support for communism. And in Brown v. Louisiana, 383 U.S. 131 (1966), the Court held that a sit-in by black students in a racially restricted library comes within the First Amendment's scope.

In determining whether conduct is sufficiently expressive to qualify for First Amendment protection, an analysis of the context in which the conduct takes place is of paramount importance. The leading case on this point is Spence v. Washington, 418 U.S. 405 (1974), where the Court held that the act of displaying a United States flag with a peace symbol attached to it was conduct protected by the First Amendment. The defendant had displayed his flag as a protest against then-recent actions of the United States military in Cambodia and at Kent State University. In holding that the defendant's conduct was sufficiently imbued with elements of communication to fall within the scope of the First Amendment, the Court looked to two factors: first, whether there was an "intent to convey a particularized message", and second, whether "the likelihood was great that the message would be understood by those who viewed it". 418 U.S. at 410-11. See also Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984); id. at 304-05 (Marshall, J., dissenting). The Court held that the defendant clearly intended to make a statement concerning the domestic and foreign affairs of his government, and that "it would have been difficult for the great majority of citizens to miss the drift of [the defendant's] point at the time that he made it." Spence, 405 U.S. at 410.

The Spence analysis applies with equal, if not greater, force to the actions of the defendants in this case. For the defendants here clearly intended to convey a particularized message through their conduct. Their primary purpose in taking their shirts off in Cobbs Hill Park was to impress upon the public consciousness, in as dramatic a way as possible, the fact that women's breasts are not sex objects, and to challenge the repressive, puritanical and sexist attitudes which gave rise to section 245.01 of the Penal Law. The defendants' choice of location for their protest was tailored to communicate their message, as Cobbs Hill Park is a recreational area where men regularly appear top-free.

There can be no doubt that the political and ideological significance of defendants' actions was likely to be understood by those who viewed them. The defendants' conduct in removing their shirts at Cobbs Hill Park was accompanied by extensive speech lying at the core of the First Amendment's protections. The defendants communicated their message not merely by exposing their breasts, but also by discussing their views with supporters and other individuals who had assembled to witness the rally, by displaying signs and wearing tee-shirts expressing their views, by issuing a press release in which they explicitly stated the meaning of the protest, and by discussing their views with members of the press both before and after the demonstration. The news media certainly understood the ideological significance of defendants' actions; reporters from newspapers, radio stations, and television stations from across the Nation provided extensive coverage to the defendants' demonstration. Since the defendants clearly intended to communicate a particularized message through their conduct, and the likelihood was great that the message would be understood by those who viewed their actions, defendants' conduct was sufficiently expressive to come within the First Amendment's protection of freedom of speech.

The facts of this case are readily distinguishable from those of earlier cases in which courts have declined to accord public exposure of the human body First Amendment protection. See, e.g., South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984); Chapin v. Town of Southampton, 457 F.Supp. 1170 (E.D. N.Y. 1978); People v. Hollman, __ A.D.2d __ (1985). For none of the reported cases have arisen in the context of a protest, demonstration or rally involving verbal and written forms of expression as well as expressive nudity. South Florida Free Beaches and Chapin were both actions for declaratory and injunctive relilef in which plaintiffs sought the right to sunbathe in the nude. Hollman similarly involved a prosecution for nude sunbathing in violation of Section 245.01 of New York's Penal Law. In none of these cases did the parties demonstrate a clear "intent to convey a particularized

message" as the defendants did here; nor did these cases involve a substantial likelihood "that the message would be understood by those who viewed it". Spence v. Washington, 418 U.S. at 410-11. Indeed, in each of the three cases above, the courts pointed out the key distinguishing characteristic of the present case, stating that nudity is protected as speech when it is combined with some mode of expression which itself is entitled to First Amendment protection. South Florida Free Beaches, 734 F.2d at 610; Chapin, 457 F.Supp. at 1174; Hollman, __ A.D.2d __ (1985).

The fact that expressive conduct involves exposure of the human body does not divest that conduct of First Amendment protection, for nudity in and of itself may not be equated with obscenity. See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975); Jenkins v. Georgia, 418 U.S. 153, 161 (1974); Miller v. California, 413 U.S. 15 (1973). The State may, of course, directly proscribe nudity which is intentionally or effectively "lewd". New York State has, in fact, done just this in Section 245.00 of the Penal Law, which provides that:

> A person is guilty of public lewdness when he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, or (b) in private premises under circumstances in which he may readily be observed from either a public place or from other private premises, and with intent that he be so observed.

But the New York courts have repeatedly held that nudity, in and of itself, is not obscene, and is not punishable under the State's public lewdness statutes. See, e.g., Matter of Excelsior Pictures v. Regents of the University of New York, 3 N.Y.2d 237, 242 (1957); People v. Burke, 267 N.Y. 571 (1935); People v. Hardy, 77 Misc.2d 1092 (App. Term, 2nd Dept. 1974); People v. Gilbert, 72 Misc. 75 (Kings Co. Crim. Ct. 1972). The sight of a woman's breasts may be unappealing and unattractive to some people; it may be repulsive and vulgar to others. Nevertheless, expressive conduct involving nudity retains its First Amendment protection in the absence of conduct making the public exposure lewd or obscene.

B. The Governmental Interests Allegedly Served By Section 245.01 Are Insufficient To Justify Its Substantial Limitation Of First Amendment Freedoms.

Defendants acknowledge the fact that the First Amendment inquiry in this case is not completed merely by a showing that they were engaged in expressive conduct within the scope of the First Amendment's protections. The Supreme Court has held that where "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently compelling governmental interest in regulating the nonspeech elements may justify incidental limitations on First Amendment freedoms. U.S. v. O'Brien, 391 U.S. 367, 376 (1968). But such limitations are constitutionally permissible only where the regulation furthers an important or substantial governmental interest, where that interest is unrelated to the suppression of free expression, and where the incidental restriction on First Amendment freedoms is no greater than is essential to furtherance of the governmental interest. Id. at 377. All three of these criteria must be satisfied for a statute restricting expressive conduct to pass constitutional muster; Section 245.01 of the New York State Penal Law falls far short on all counts.

Three governmental interests are usually asserted on behalf of statutes which proscribe public nudity in and of itself, rather than nudity which is intentionally or effectively lewd: first, the State's interest in protecting its citizens from unwelcome exposure to nudity in public places; second, the State's interest in shielding its children from the allegedly unhealthy influence of exposure to nudity; and third, the State's interest in protecting those who might wish to appear in public unclothed from harassment, physical violence and sexual attack. Each of these asserted interests will be examined in turn and shown to fail the strict requirements of the three-part O'Brien test described above.

1. Protecting Citizens From Unwelcome Exposure To Nudity In Public Places.

The principal argument advanced in support of Section 245.01 is that it protects citizens who might be offended or embarrassed by the sight of public nudity. But Supreme Court decisions demonstrate that such an interest is neither "important" nor "substantial". In Cohen v. California, 403 U.S. 15 (1971), the Court overturned a criminal conviction based on the defendant's public display of a jacket bearing the epigraph "Fuck the Draft" on the back. The defendant was walking through a Los Angeles courthouse at the time of his arrest. In rejecting the State's argument that prosecution was justified to prevent a distasteful mode of expression from being thrust upon unwilling or unsuspecting viewers, the Court stated:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is ... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Id. at 21. In Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), the Court invalidated a Jacksonville, Florida ordinance which prohibited drive-in movie theaters with screens visible from public streets and places from showing movies containing nudity. Following the Court's analysis in Cohen, Justice Powell wrote:

> The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes". Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather ... the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."

Id. at 210-11 (citations omitted).

The State may well have an interest in protecting the privacy of citizens who might be offended by unwelcome exposure to the nude human form in public places. But this interest is de minimus at most, since hypersensitive individuals are always free to avoid continued offense simply by looking the other way. As the Court stated in Cohen, 403 U.S. at 15-16:

> [P]ersons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking though a courthouse corridor than for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home.

New York State's interest in protecting citizens from exposure to nudity in public parks, on public streets, and in other public places where they are in no sense captive is de minimus; this interest cannot be considered "important" or "substantial" as required by U.S. v. O'Brien, 391 U.S. 367, 376 (1968).

Even if the State's interest in shielding citizens from unwelcome exposure to public nudity were considered important, the statute would still fail to satisfy the second prong of the O'Brien test, which requires that the governmental interest served by a statute be unrelated to the suppression of free speech. Content-neutral justifications for regulating nudity might include promoting the public health by reducing the incidence of skin cancer, or promoting traffic safety by ensuring that drivers keep

their eyes on the road.[1] But the State's interest in protecting its citizens from exposure to potentially offensive visual stimuli is quite different from its interest in promoting public health and safety. Here the State's interest is directly related to the perceived offensiveness of an expressive activity. The nude human form is not offensive in and of itself; rather, it is the symbolic challenge that public exposure of the female breast poses to puritanical and sexist ideologies which causes some members of our society to be offended. As the State's interest is not completely unrelated to the suppression of free expression, Section 245.01 fails to satisfy the second prong of the O'Brien test. 391 U.S. at 376.

Nor does the statute satisfy the third prong of the O'Brien test, which requires that any incidental restriction of First Amendment freedoms be no greater than is essential to furtherance of the governmental interest. Section 245.01 of the Penal Law prohibits nudity in all public places and at all times. The establishment of separate clothing-optional parks and beaches would certainly serve the State's interest in protecting the privacy of citizens who might be offended or embarrassed equally as well as Section 245.01, with far less intrusion upon essential First Amendment freedoms. Individuals who are offended by public nudity would thereby be put on notice concerning parks, beaches and other recreational areas they might wish to avoid. The defendants and other individuals who might wish to appear topless or nude as part of expressive activity protected by the First Amendment would have access to public lands for this purpose.

---

1. Of course, neither of these interests would be sufficient to justify Section 245.01's broad regulation of public nudity. The first interest is insufficient on equal protection grounds, in that men as well as women fall victim to skin cancer. The second is insufficient because the statute sweeps far too broadly, prohibiting nudity in all public places and not just on or near public thoroughfares. Moreover, it would be ludicrous to suggest that either of these interests was actually considered by the State legislature in passing Section 245.01; they can not, therefore, be used to justify the statute's infringement of First Amendment freedoms. See, e.g., CLR Corp. v. Henline, 520 F. Supp. 760 (W.D. Mich. 1981), aff'd, 702 F.2d 637 (6th Cir. 1983).

2. Shielding Children From Unhealthy Exposure To Nudity.

A second argument which might be advanced in support of Section 245.01 of the Penal Law is that it protects children from the allegedly unhealthy influence of nudity. But the Supreme Court has foreclosed any suggestion that this interest is "important" or "substantial". While a State can clearly place more stringent controls on communicative materials available to youth than on those available to adults, Ginsberg v. New York, 390 U.S. 629 (1968), minors are entitled to a significant measure of First Amendment protection, Tinker v. Des Moines School District, 393 U.S. 503 (1969), and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. See, e.g., Rabeck v. New York, 391 U.S. 462 (1968); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968). Thus, the Court held in Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-14 (1975), that an ordinance prohibiting drive-in movie theaters from showing films containing nudity could not be justified as a measure designed to protect children. The Court emphasized the fact that all nudity cannot be deemed obscene, even as to minors; to be obscene, the Court held, expression must be in some significant way erotic. 422 U.S. at 213 & n. 10. The State's interest in shielding children from exposure to nudity which is not obscene is minimal at most.

Like the State's interest in protecting adults from exposure to nudity which they might find offensive, the State's interest in shielding children from the allegedly unhealthy effects of seeing public nudity is not unrelated to the suppression of free speech. For nudity is not a dangerous substance like tobacco or alcohol which is kept from children because of its harmful proclivities; rather, the State's interest is in limiting the access children have to information concerning alternative lifestyles, values and ideologies.

This justification also fails to satisfy the requirement that incidental restrictions on First Amendment freedoms be no greater than is essential to furtherance of the

governmental interest. The State's interest in protecting children from images that the legislature considers unsuitable could be served equally well by designating certain parks and beaches as clothing-opinional recreational areas and placing such areas off limits to persons below the age of majority. Children would thereby be protected from allegedly harmful exposure to nudity, while the defendants and others similarly situated would have access to public lands to engage in expressive conduct protected by the First Amendment.

3. Protecting Those Who Might Wish To Appear Unclothed From Harrassment, Physical Violence And Sexual Attack.

A third argument which might be presented on behalf of Section 245.01 is that it protects those who might wish to appear nude in public from harassment, physical violence, and sexual attack. However, the mere speculation that public nudity might incite violence can not be considered an "important" or "substantial" governmental interest. A mere apprehension of difficulties does not overcome the right to free expression. See, e.g., United States v. Grace, 461 U.S. 171, 182 (1983); Tinker v. Des Moines School District, 393 U.S. 503, 508 (1969). Indeed, Supreme Court cases have long held that the potentially hostile reaction of listeners is an insufficient justification for curtailing free speech. As the Court observed in Cohen v. California, 403 U.S. 15, 23 (1971):

> We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.

See also Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972); Tinker v. Des Moines School District, 393 U.S. 503 (1969); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949); Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

The State's interest in protecting those who might wish to appear in public without clothes from harm also fails to satisfy the third prong of the O'Brien test, as alternatives are available which would be far less restrictive of First Amendment freedoms. The normal and appropriate method of protecting citizens from physical assault is through the provision of police protection and enforcement of the criminal law. Establishment of clothing-optional parks and beaches would enable the police to focus their limited resources, while permitting substantially more expressive nudity than is allowed under Section 245.01's sweeping prohibition.

None of the possible justifications for Section 245.01 is sufficient to satisfy the strict requirements of the three-part test laid down in United States v. O'Brien, 391 U.S. 367, 376 (1968). Nor can the statute be upheld as a reasonable time, place or manner restriction on freedom of speech. The Supreme Court has held that such restrictions are permissible only where they are justified without reference to the content of the regulated speech, where they are narrowly tailored to serve a significant governmental interest, and where they leave open ample alternative channels for communication of the information. See, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); United States v. Grace, 461 U.S. 171, 177 (1983); Heffron v. Int'l Society for Krishna Consciousness, 452 U.S. 640, 647-48 (1981). The Court has acknowledged that this standard is little, if any, different from the O'Brien test discussed above. See Clark v. Community for Creative Non-Violence, 468 U.S. at 298 & n. 8; Id. at 308 & n. 6 (Marshall, J. dissenting). No significant governmental interest can be found to justify Section 245.01's broad restriction of First Amendment freedoms; the governmental interests asserted on the statute's behalf are not content-

neutral; and the statute is not narrowly tailored, as less restrictive alternatives are clearly available. For the same reasons that Section 245.01 fails to satisfy the requirements of the O'Brien test, it cannot be upheld as a reasonable time, place or manner restirction on free expression.

C. Section 245.01 Is Void For Overbreadth In Violation Of The First And Fourteenth Amenments.

A criminal statute is overbroad in violation of the First and Fourteenth Amendments to the United States Constitution when its terms are so far-reaching as to proscribe constitutionally protected conduct. See, e.g., Zwickler v. Koota, 389 U.S. 241, 249-50 (1967). If a statute or ordinance, read in its ordinary meaning, could be employed to punish protected behavior, it must be struck down even though the person against whom it is being enforced was not engaged in such protected conduct. See, e.g., Doran v. Salem Inn, Inc.. 422 U.S. 922, 933 (1975), where the Court wrote: "We have previously held that even though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court". See also Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). The very existence of an overbroad statute has a chilling effect on the exercise of constitutionally protected rights. Thus, in determining issues of overbreadth, the court need not determine whether the defendants' activities are constitutionally protected. See Bigelow v. Virginia, 421 U.S. 809 (1975).

Section 245.01 of the Penal Law is unconstitutionally overbroad in that it has a substantial inhibiting effect on freedom of speech and expression at the core of the First Amendment. Doran v. Salem Inn, Inc., 422 U.S. 922, 933 (1975); Collin v. Smith, 447 F. Supp. 676, 692 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978). The defendants have standing to challenge the statute on their own behalf, and to make overbreadth arguments on behalf of individuals not currently before the Court.

Secion 245.01 prohibits a woman from exposing her breasts in any public place. Within the almost unlimited scope of this statute, the only exceptions to the proscription of public exposure are in the contexts of live entertainment and breast feeding of infants. But the First Amendment does not begin and end with protection of live entertainment. The statute eviscerates traditionlly protected areas of First Amendment activity including political speech, education, scientific research, and artistic creation.

Human nudity is an extraordinarily viable means for emphasizing statements of political protest. It is dramatic, compelling, and ensures attention from the news media, promoting broad dissemination of the message sought to be communicated. Moreover, exposure of the human body often plays a powerful substantive role in political speech. In 1969, a group of Grinnell college students disrobed completely at a speech given by a representative of Playboy Magazine to protest the magazine's exploitation of female nudity for commercial gain. In 1977, a number of women in Berkley, California marched topless in a May Day Equal Rights Parade. In July, 1983, naturists in the New York City area held a nude demonstration at Jacob Riis Park to protest legislative repression of clothing-optional lifestyles.[2] On May 30, 1985, in Oshkosh, Wisconsin, four women took off their clothes during a speech by President Reagan to emphasize political statements being displayed on signs: "Naked Not Nuded", "Reagan Must Face The Naked Truth", and "Our Emperor Has No Clothes". New York Post, May 31, 1985, at 13. And on June 21, 1986, the defendants in this case removed their shirts in Cobbs Hill Park to challenge the repressive, puritanical and sexist attitudes which gave rise to Section 245.01 of the Penal Law. Nudity in all of the above examples was central to political speech; Section 245.01 prohibits all of these dramatic political protests, as they do not fall within the live entertainment exception.

---

2. The demonstrators were arrested under 18 U.S.C. Sction 13, assimilating Section 245.01 of New York's Penal Law, but all charges were dropped when the United States Attorney for the Eastern District of New York refused to prosecute.

The framers of this piece of legislation also did not see fit to exempt exposure of the human body for educational and scientific purposes from the sweeping statutory proscription. Section 245.01 sweeps within its ambit the exposure of private or intimate parts of the human body in the context of anatomy and biology classes, social science seminars, human sexuality courses, consciousness raising and therapy groups, cancer detection demonstrations and lectures on reconstructive plastic surgery. Medical, psycho-social and psycho-sexual research that involves human nudity is also severely restricted. In short, the statute makes a shambles of academic and scientific freedom.

Section 245.01 also threatens artistic expression by excluding nudity from its creation. Models, actors and actresses have no immunity from prosecution under the statute while the art form is in creation. Artistic expression in the State of New York is thus undoubtedly chilled by the statute's restrictions on filming, photographing, painting, and sculpting nude subjects.

The statute is void for overbreadth in violation of the First and Fourteenth Amendments in that it has a chilling effect on constitutionally protected political, educational, scientific, and artistic expression.

D. Section 245.01 Compels Defendants To Promote Viewpoints With Which They Disagree In Violation Of The First And Fourteenth Amendments.

The right of freedom of thought protected by the First Amendment includes both the right to speak freely and the right to refrain from speaking at all. See Wooley v. Maynard, 430 U.S. 705, 714 (1977); Board of Education v. Barnette, 319 U.S. 624, 633-34 (1943); id. at 645 (Murphy, J., concurring). The Constitution not only guarantees the individual's right to promote unorthodox ideological, political and religious viewpoints, unfettered by governmental interference, but also protects the individual's right to refuse to foster viewpoints which she considers morally, politically or ideologically repugnant. Wooley v. Maynard, 430 U.S. at 714.

In Board of Education v. Barnette, 319 U.S. 624 (1943), the Supreme Court struck down a West Virginia statute requiring public school students to salute the United States flag, holding that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority...." 319 U.S. at 636. Similarly, in Wooley v. Maynard, 430 U.S. 705 (1977), the Court invalidated a New Hampshire statute prohibiting individuals from expunging the state motto, "Live Free or Die," from their automobile license plates. Chief Justice Burger, writing for the Court, concluded that:

> Here, as in Barnette, we are faced with a state measure which forces an individual, as part of his daily life — indeed constantly while his automobile is in public view — to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

430 U.S. at 715 (quoting Barnette, 319 U.S. at 642).

Members of our society have frequently attempted to communicate political, ideological and religious views through their choice of specific items of clothing. See, e.g., Cohen v. California, 403 U.S. 15 (1971) (jacket with "Fuck the Draft" insignia); Tinker v. Des Moines School District, 393 U.S. 503 (1969) (black armbands); Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978) (Nazi uniforms). Others have chosen their clothing not only for the purpose of expressing particular ideas or concepts, but also to avoid communicating messages which they believe are implicit in certain fashions. For example, members of the Quaker faith traditionally refrained from wearing colorful and expensive clothing because of their belief that contemporary fashions expressed a preoccupation with man rather than reverence towards God. See, e.g., Bacon, M.H., The Quiet Rebels: The Story of the Quakers in America, at 45-46 (New Society Publishers 1985). See also Hostetler, J., Amish Society, at 234-38 (Johns Hopkins Univ. Press, 3d Ed. 1980).

Just as specific articles of clothing have communicative content in our society, the wearing of clothing — in and of itself — expresses moral, religious and ideological viewpoints in certain contexts. Defendants contend that by requiring individuals to wear clothing in situations where the sole function served by clothing is concealment of the human body, Section 245.01 of the Penal Law compels them to communicate values and ideologies which they actively oppose. Defendants further contend that by requiring women to conceal their breasts in contexts where men regularly and unabashedly appear top-free, Section 245.01 of the Penal Law compels them to promote and foster sexist myths, values and ideologies which they consider philosophically and morally repugnant.

Defendants are naturists and feminists. As naturists, defendants believe that the human body is a wholesome physical entity which is neither inherently obscene nor likely to cause erotic stimulation in typical social contexts. As feminists, defendants resent and reject the view that their breasts are sex objects. They conscientiously believe that there is a clear relationship between the sexual objectification of women and the relegation of women to subordinate roles in our male-defined society. The defendants further believe that our society's predominate sexist ideology promotes and condones acts of physical and sexual violence perpetrated against women. Section 245.01 of the Penal Law compels defendants to promote repressive and puritanical views concerning the human body which run directly contrary to their naturist ideology; Section 245.01 similarly requires defendants to foster sexist views concerning the human body which run counter to their feminist ideology.

The infringement of defendants' rights in this case is far more pervasive than that in either Barnette or Wooley. The statute in Barnette required students to salute the flag for at most several seconds each school day. Here, defendants' right of access to any and all public areas — 24 hours a day, 365 days each year — is conditioned upon their willingness to promote viewpoints which they find noxious. The

statute in Wooley merely required drivers to display the State motto on their automobile license plates. Here, defendants are compelled to communicate ideologies which they consider offensive not by attaching a message to an object, but by bearing the message directly on their bodies.

Section 245.01 of the Penal Law compels defendants to promote viewpoints which they consider morally, politically and ideologically repugnant; it violates their right to refrain from speaking in violation of the First and Fourteenth Amendments to the United States Constitution.

V: SECTION 245.01 OF THE PENAL LAW VIOLATES DEFENDANTS' RIGHTS TO FREEDOM OF SPEECH AND EXPRESSION UNDER ARTICLE I, §8 OF THE NEW YORK STATE CONSTITUTION.

Article I, Section 8 of the New York State Constitution provides that: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press". The New York Court of Appeals has recognized that "at the very least, the guarantee of freedom of expression set forth in our State Constitution is of no lesser vitality than that set forth in the Federal Constitution". Bellanca v. New York State Liquor Authority, 54 N.Y.2d 228, 235 (1981), cert. denied, 456 U.S. 1006 (1982). Moreover, the Court of Appeals has acknowledged the special role that free speech and exchange of ideas play in the democratic process of our State, and has suggested that the free speech provisions of our Constitution may, in fact, provide even broader protections than are provided under the First Amendment. See, e.g., Matter of Beach v. Shanley, 62 N.Y.2d 241, 255 (1984) (Wachtler, J., concurring); People v. Ferber, 57 N.Y.2d 256, 259 (1982). See also SHAD Alliance v. Smith Haven Mall, 106 A.D.2d 189 (2nd Dept.), rev'd on other grounds, 66 N.Y.2d 496 (1985).

If the Court finds that Section 245.01 violates the First and Fourteenth Amendments to the United States Constitution, it should also find the statute violative of the New York State Constitution's free speech guarantee. If, however, the Court should find that the defendants' conduct is not protected under the Federal Constitution as interpreted by the United States Supreme Court, it should nevertheless hold that prosecution is barred under Article I, §8 of the State Constitution. The defendants engaged in nonviolent, political expression lying at the heart of our State Constitution's free speech provision. Article I, §8 would accord a hollow shell of protection to free expression if it shielded the commercial exploitation of women by men from state

regulation while providing no protection to the defendants' poignant efforts to liberate women from sexist perceptions of the female body.

CONCLUSION

FOR THE FOREGOING REASONS, THE DEFENDANTS' RESPECTFULLY REQUEST THAT THIS COURT GRANT THE REQUESTED RELIEF AND DECLARE THE CHALLENGED REGULATION UNCONSTITUTIONAL.

DATED: August 13, 1986

Respectfully submitted,

EDWARD J. NOWAK
Monroe County Public Defender
Attorney for Defendant
BY: LAWRENCE L. KASPEREK
Assistant Public Defender
10 N. Fitzhugh Street
Rochester, New York 14614

BY: DANIEL DELAUS
Legal Intern
10 N. Fitzhugh Street
Rochester, New York 14614
(716) 428-5210

BY: DAVID R. MOSS
Attorney for NIKKI KRAFT,
KATHLEEN RILEY, DEBORAH
SEYMOUR, ELISE JO TOOLY
and LYNN ZICARI
426 Powers Building
Rochester, New York 14614
(716) 454-5419